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Equal Protection Theory and the Harvey Milk High School: Why Anti-Subordination Alone Is Not Enough

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EQUAL PROTECTION THEORY AND THE HARVEY MILK HIGH SCHOOL: WHY ANTI-SUBORDINATION ALONE IS NOT ENOUGH

Abstract: In recent years, advocates for youth have begun to support voluntary school segregation as a solution to the problem of inequality in public schools. These advocates are less concerned with different treatment on the basis of classifications like race or sex than with the disadvantages resulting from such classifications. They believe that this approach to inequality, called anti-subordination, provides a better way to achieve equality than does formal equality, the method of treating everyone alike. The introduction of the Harvey Milk High School in New York City, the nation's first public school established to meet the needs of lesbian, gay, bisexual, transgender, and questioning students and others in crisis, provides a fresh opportunity to examine this equal protection debate. This Note will argue that anti-subordination must be reunited with formal equality through comprehensive programs in integrated schools in order to provide true equal protection for all students.

INTRODUCTION

Segregated public education may appear to be an institution American society abolished as it overcame its discriminatory past.[1] Yet the practice of segregating children in public schools not only survives America's past; in certain contexts, it is gaining momentum.[2] This practice, however, is significantly more complicated than it seems.[3] Some advocates argue that, when voluntary, segregation is an important step forward towards achieving equality in public education.[4]

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[1] Kristen J. Cerven, Note, *Single-Sex Education: Promoting Equality or an Unconstitutional Divide?*, 2002 U. ILL. L. REV. 699, 699.

[2] *Id.*

[3] *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 478 (1976); W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. OF NEGRO EDUC. 328, 335 (1935); Amy H. Nemko, *Single-Sex Public Education After* VMI: *The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19, 76–77 (1998); Pamela J. Smith, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2014–15 (1992).

[4] DuBois, *supra* note 3, at 333–35; *see* U.S. CONST. amend. XIV, § 1; Nemko, *supra* note 3, at 76–77; Smith, *supra* note 3, at 2014–15.

After decades of fighting for integration and watching racial desegregation efforts falter, attitudes toward equality in public schools have begun to change in recent years.[5] Some advocates argue that the formal equal treatment sought in integration cases can be an empty ideal rather than the key to equality.[6] These advocates are less concerned with different treatment on the basis of classifications like race or sex than with the disadvantages resulting from such classifications.[7] Their approach focuses on repairing the negative impact discrimination has on members of disadvantaged groups.[8] Advocates believe that this method, called anti-subordination, provides a better way to achieve equality than does formal equality, the method of treating everyone alike.[9]

The anti-subordination movement contends that it is perfectly acceptable, even desirable, to treat children differently on the basis of their group membership if it will help them overcome the special obstacles they face.[10] Discrimination on the basis of group classifications is therefore positive if it serves the ultimate purpose of achieving equality.[11] Anti-subordination and formal equality advocates thus interpret the U.S. Constitution's guarantee of equal protection, which is rooted in the Fourteenth Amendment, from distinct perspectives.[12] The anti-subordination movement has sought voluntary segregation as a solution to a public school system that is failing its female and minority students, preferring to target the immediate educational needs of these children rather than insist on integrated education—an ideal that has not lived up to its promise.[13]

Voluntary school segregation has become increasingly popular over the last decade, particularly with regard to single-sex schools.[14]

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[5] *See* Bell, *supra* note 3, at 488; Nemko, *supra* note 3, at 76–77; Smith, *supra* note 3, at 2014–15.

[6] Bell, *supra* note 3, at 478; DuBois, *supra* note 3, at 335; Nemko, *supra* note 3, at 32–33.

[7] Nemko, *supra* note 3, at 31; *see* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003, 1005–08 (1986); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 Stan. L. Rev. 1, 2 (1991).

[8] Nemko, *supra* note 3, at 31; *see* Gotanda, *supra* note 7, at 2.

[9] Nemko, *supra* note 3, at 31–34, 76–77; *see* Colker, *supra* note 7, at 1007, 1066; Smith, *supra* note 3, at 2015. Ruth Colker uses the term "anti-differentiation" to describe formal equality. Colker, *supra* note 7, at 1005.

[10] *See* Gotanda, *supra* note 7, at 2; Nemko, *supra* note 3, at 59–61; Smith, *supra* note 3, at 2048.

[11] *See* Colker, *supra* note 7, at 1008–10.

[12] U.S. Const. amend. XIV, § 1; *see* Nemko, *supra* note 3, at 21.

[13] Nemko, *supra* note 3, at 76–77; *see* Bell, *supra* note 3, at 478; Smith, *supra* note 3, at 2014–15.

[14] *See* Cerven, *supra* note 1, at 699.

Although some single-sex schools have existed for years, a new crop has appeared across the United States from New York to California.[15] These schools are based on several different models.[16] There are, for example, single-sex schools that are targeted at empowering young women; school districts have experimented with paired single-sex academies that educate boys and girls separately as well.[17] Advocates have also pushed for all-male black schools, although this idea has appeared to be too controversial to sustain support.[18]

The Harvey Milk High School ("HMHS") in New York City, the first public school designed to meet the needs of lesbian, gay, bisexual, transgender, and questioning ("LGBTQ") students, adds a new dimension to this trend.[19] HMHS has existed since 1985 as a special program for LGBTQ students.[20] The program operates as a partnership between the New York City Department of Education and the Hetrick-Martin Institute, a nonprofit organization dedicated to advocating for and supporting LGBTQ youths.[21] Originally a small off-site

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[15] *Id.* at 699, 717, 722, 723.

[16] *See id.* at 717, 722 (comparing Young Women's Leadership School in Harlem and Young Women's Leadership Charter School in Chicago with paired single-gender academies in California, which have not been as successful).

[17] *Id.* at 717, 722, 723–24.

[18] *See* Garrett v. Bd. of. Educ., 775 F. Supp. 1004, 1014 (E.D. Mich. 1991). In 1991, in *Garrett v. Board of Education*, the Eastern District of Michigan found in favor of the plaintiffs to defeat a proposal for all-male black schools in Detroit on the basis of sex discrimination. *Id.* The schools, although targeted to black boys, did not limit admission on the basis of race. *See id.* Yet the court's subtle acknowledgement of the race issue indicates the policy problem inherent in segregation of this kind even if it were constitutional as to sex. *See* Richard Cummings, *All-Male Black Schools: Equal Protection, the New Separatism and* Brown v. Board of Education, 20 HASTINGS CONST. L.Q. 725, 754 (1993); *see also* Helaine Greenfeld, Note, *Some Constitutional Problems with the Resegregation of Public Schools*, 80 GEO. L.J. 363, 370 (1991). It must be noted, however, that these urban schools were already de facto segregated; there would have been no affirmative need to exclude white children in order to achieve a black student body. *See* Smith, *supra* note 3, at 2009–11.

The terms "black" and "white" are used throughout this Note because they are the most inclusive terms for people who may share skin color, but not necessarily a common ancestry or culture. *See* Rachel L. Swarns, *'African-American' Becomes a Term for Debate*, N.Y. TIMES, Aug. 29, 2004, at 1 (using the term "black" in describing the cultural debate over terminology).

[19] *See* Catherine Gewertz, *Expansion of N.Y.C. School Ignites Debate over Gay Students' Needs*, EDUCATION WEEK, Sept. 3, 2003, at 7. The Hetrick-Martin Institute ("HMI"), a nonprofit organization that helps to run HMHS, uses the inclusive term LGBTQ. *See* HMI, *About HMI & HMHS*, *at* http://www.hmi.org/GeneralInfoAndDonations/AboutHMIAndHMHS/default.aspx (last visited Sept. 3, 2004) [hereinafter HMI, *About HMI & HMHS*].

[20] Gewertz, *supra* note 19, at 7; *see* HMI, *About HMI & HMHS*, *supra* note 19.

[21] *See* Gewertz, *supra* note 19, at 7; HMI, *About HMI & HMHS*, *supra* note 19.

program, HMHS is now a full-fledged, four-year institution.[22] HMHS does not discriminate on the basis of sexual orientation in admissions; rather, it is open to all applicants and aims to admit students who have been the victims of verbal or physical abuse.[23]

HMHS is a creative response to the unique problems LGBTQ youths face in public schools.[24] Recent studies reflect that 69% of LGBTQ students reported experiencing harassment or violence at school.[25] A wealth of statistics demonstrates the extent of the discrimination these students face.[26] Over 40% of these students do not feel safe at their schools.[27] Ultimately, 28% of LGBTQ students drop out of school altogether.[28] In seeking to eliminate these problems, HMHS provides a fresh opportunity to examine voluntary school segregation through the lens of the anti-subordination versus formal equality debate underscoring it.[29]

Part I of this Note introduces the philosophical debate between anti-subordination and formal equality.[30] It then presents arguments for and against voluntary school segregation based on these competing theories.[31] Part II examines the relevant equal protection jurisprudence with a focus on U.S. Supreme Court cases.[32] This Part describes the landmark cases on segregated public education, as well as an important case on segregation in the military.[33] It also explains scrutiny considerations relevant to evaluating an equal protection problem.[34]

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[22] Donna I. Dennis & Ruth E. Harlow, *Gay Youth and the Right to Education*, 4 YALE L. & POL'Y REV. 446, 454 n.36 (1986); HMI, *Q & A's on HMHS*, *at* http://www.hmi.org/GeneralInfoAndDonations/QAndAsonHMHS/default.aspx (last visited Sept. 3, 2004) [hereinafter HMI, *Q & A's on HMHS*].

[23] *See* HMI, *Q & A's on HMHS*, *supra* note 22.

[24] *See* Dennis & Harlow, *supra* note 22, at 454.

[25] HMI, *LGBTQ Youth Statistics*, *at* http://www.hmi.org/Community/LGBTQYouthStatistics/default.aspx (last visited Sept. 3, 2004) [hereinafter HMI, *LGBTQ Youth Statistics*]. HMI obtains its information from the Sexual Information and Education Council of the United States and from the National Mental Health Association. *Id.* More information is available at http://www.siecus.org and http://www. nmha.org, respectively.

[26] HMI, *LGBTQ Youth Statistics*, *supra* note 25. For example, 46% of LGBTQ students reported verbal harassment, 36.4% reported sexual harassment, 12.1% reported physical harassment, and 6.1% reported physical assault. *Id.*

[27] *Id.*

[28] *Id.*

[29] *See* Gewertz, *supra* note 19, at 7.

[30] *See infra* notes 41–79 and accompanying text.

[31] *See infra* notes 80–126 and accompanying text.

[32] *See infra* notes 127–215 and accompanying text.

[33] *See infra* notes 134–190 and accompanying text.

[34] *See infra* notes 191–215 and accompanying text.

Finally, Part III analyzes HMHS and concludes that the school is constitutional.[35] It argues, however, that voluntary school segregation is detrimental because it prioritizes anti-subordination over formal equality in the dangerous context of segregation.[36] This approach sends society the message that hostility justifies segregation, and has negative concrete effects, such as allowing discrimination in integrated schools to continue, entrenching classifications, and creating stigma.[37] Fighting discrimination within integrated schools is a better approach because it reunites anti-subordination and formal equality by addressing real student needs, while insisting on integrated education.[38] Reuniting these theories provides the best chance that LGBTQ students will receive equal protection in public education in the long run.[39] It also provides the best chance to become a society in which being a member of a particular classification is irrelevant for equal protection purposes.[40]

I. Anti-Subordination v. Formal Equality

A. *The Debate Behind the Debate: Protecting Disadvantaged Individuals Versus Treating Everyone Alike*

The debate between anti-subordination and formal equality is, at its heart, a debate over the central meaning of the Fourteenth Amendment of the U.S. Constitution.[41] The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[42] This simple phrase has been the subject of intense deliberation throughout equal protection jurisprudence.[43] The Equal Protection Clause encompasses at least two potentially conflicting ideals—treating people alike and providing equal protection to disadvantaged individuals.[44] Courts have prioritized one goal over the other at differ-

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[35] *See infra* notes 217–249 and accompanying text.

[36] *See infra* notes 250–274 and accompanying text.

[37] *See infra* notes 275–321 and accompanying text.

[38] *See infra* notes 322–347 and accompanying text.

[39] *See infra* notes 322–347 and accompanying text.

[40] *See infra* notes 322–347 and accompanying text.

[41] *See* Nemko, *supra* note 3, at 21.

[42] U.S. Const. amend. XIV, § 1.

[43] *See* Nemko, *supra* note 3, at 31; *see also* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. Ill. L. Rev. 615, 616.

[44] *See* Hutchinson, *supra* note 43, at 619–24; Nemko, *supra* note 3, at 21.

ent times, sometimes enforcing formally neutral rules and sometimes allowing classification-specific means of overcoming obstacles, such as affirmative action.[45] The dominant approach in the law today requires formal equality as the default rule, permitting classification-specific approaches to equal protection problems in narrow circumstances.[46]

Additionally, the U.S. Supreme Court has recently articulated that equal protection problems must be dealt with in terms of suspect classifications, not classes.[47] The Court has shifted the relevant inquiry from classes to classifications over the last couple of decades.[48] For example, whereas the Court once referred to blacks as a suspect class, it now refers to race as a suspect classification.[49] Thus, by emphasizing the classification itself rather than whether a person is advantaged or disadvantaged within it, the Court has moved further in the direction of supporting formal equality.[50]

Anti-subordination advocates, however, argue that anti-subordination, rather than formal equality, was the true goal of the Fourteenth Amendment.[51] Congress originally adopted the Fourteenth Amendment after the Civil War to remedy the effects of black slavery, an original intent which the U.S. Supreme Court has recognized.[52] In light of this goal, anti-subordination theorists find that the formal

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[45] *See* Nemko, *supra* note 3, at 21 (describing different approaches to gender equality). The U.S. Supreme Court has taken analogous approaches to racial equality. *Compare* Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003) (permitting affirmative action for reasons of diversity in law school admissions), *with* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (prohibiting affirmative action plan in employment).

[46] *See* Nemko, *supra* note 3, at 28–29 (discussing gender). *Compare Grutter*, 539 U.S. at 343–44 (permitting the consideration of race as one factor in an individualized assessment in law school admissions), *with* Gratz v. Bollinger, 539 U.S. 244, 253–57 (2003) (prohibiting a university admissions system awarding extra points on the basis of race). *But see* Colker, *supra* note 7, at 1011 (arguing that anti-differentiation, or formal equality, better explains the U.S. Supreme Court's approach to equal protection problems). For a detailed history of these two approaches, as well as an insightful analysis of their relationship to each other, see also Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1474–75 (2004).

[47] *See Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 216–17 (using classifications with respect to race); *see also* Craig v. Boren, 429 U.S. 190, 197–98 (1976) (using classifications with respect to gender).

[48] Hutchinson, *supra* note 43, at 638–40. *Compare Grutter*, 539 U.S. at 326, *and Adarand*, 515 U.S. at 216–17 (using classifications), *with* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (using classes).

[49] *Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 216–17; *Rodriguez*, 411 U.S. at 17.

[50] *See Grutter*, 539 U.S. at 326; *Adarand*, 515 U.S. at 216–17; *Craig*, 429 U.S. at 197–98.

[51] Nemko, *supra* note 3, at 31.

[52] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872); Nemko, *supra* note 3, at 31–32. The idea of overcoming discrimination to achieve equality has expanded over time to include other groups, such as women. *See* Nemko, *supra* note 3, at 34–35.

equality approach to equal protection, which insists on color (or other classification) blindness, is essentially empty absent historical context.[53]

The archetypical example of formal equality analysis is the 1896 case, *Plessy v. Ferguson*, in which the U.S. Supreme Court held that separate but equal accommodations in railroad cars for blacks and whites were constitutional.[54] The Court held that the treatment both races received was equal because it was parallel: whites were prohibited from using black accommodations, just as blacks were prohibited from using white accommodations.[55] The Court stated that any "badge of inferiority" perceived in this distinction was a construction imposed by blacks.[56] This analysis excludes historical and social context, maintaining that equality on its face is all that equal protection requires.[57]

In his dissenting opinion, Justice John Marshall Harlan articulated his belief that the majority's opinion in *Plessy* was a fallacy, writing that "[e]very one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."[58] This point is clear from the language of the statute itself, which provided that "'nothing in this act shall be construed as applying to nurses attending children of the other race'"; it is difficult to imagine that there were any white nurses attending black children in 1896.[59] From the perspective of anti-subordination, the central goal of equal protection may be lost without this larger understanding of what equality means in a particular case, as it was in *Plessy*, a decision that ignored the racist underpinnings of the problem at stake.[60]

A modern example of formal equality analysis arises in the context of affirmative action.[61] Some formal equality advocates maintain that affirmative action for racial minorities, which allows for different treatment based on racial classifications, violates formal equality and

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[53] Nemko, *supra* note 3, at 32–33.

[54] 163 U.S. 537, 550–51 (1896); *see* Nemko, *supra* note 3, at 32.

[55] *See Plessy*, 163 U.S. at 540–41, 550–51; Gotanda, *supra* note 7, at 38.

[56] *Plessy*, 163 U.S. at 551.

[57] Gotanda, *supra* note 7, at 38; Nemko, *supra* note 3, at 32–33; *see Plessy*, 163 U.S. at 551–52.

[58] *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

[59] *See id.* at 540–41 (quoting 1890 La. Acts 152, No. 111, § 3).

[60] Gotanda, *supra* note 7, at 38; Nemko, *supra* note 3, at 32–33; *see* 163 U.S. at 550–52.

[61] Gotanda, *supra* note 7, at 41–42; Nemko, *supra* note 3, at 33–34.

thus equal protection—for whites.[62] In *Regents of the University of California v. Bakke*, Justice Lewis F. Powell, Jr. explained this position succinctly when he stated that "equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[63] Anti-subordination theorists believe that equating discrimination against whites in the context of affirmative action with the historical discrimination against minorities is equivalent to ignoring the past—that color blindness is blind.[64] The most important question from an anti-subordination perspective is whether the classification at issue in an equal protection problem exists for exclusionary or inclusionary reasons.[65] The classification itself is the beginning, not the end, of the analysis.[66]

Additionally, anti-subordination advocates contend that formal equality does not merely disregard important social context; rather, it actually legitimates discrimination.[67] From this perspective, the existence of formal rules for dealing with discrimination creates a barrier to achieving real equality because the law will be applied to the disadvantage of oppressed groups.[68] For example, it can be argued that the body of equal protection case law produced since the 1950s has narrowed the doctrine such that it has become even more difficult to bring a cause of action than it was before these cases were decided.[69] In this view, formal equality is not merely ineffectual: it is detrimental for members of disadvantaged classifications.[70]

Some formal equality theorists, however, focus on the long-term implications of using classifications as a basis for different treatment,

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[62] Hutchinson, *supra* note 43, at 640–43 (discussing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978)); *see* Nemko, *supra* note 3, at 33–34.

[63] 438 U.S. at 289–90; *see* Hutchinson, *supra* note 43, at 642.

[64] Nemko, *supra* note 3, at 33.

[65] *See id.* at 35.

[66] *See id.*; *see also* Denise C. Morgan, *Anti-Subordination Analysis After* United States v. Virginia: *Evaluating the Constitutionality of K–12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 437–40 (discussing the asymmetrical nature of the anti-subordination principal explained in United States v. Virginia, 518 U.S. 515, 533–34 (1996) (*VMI*)).

[67] Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1049–50 (1978); Gotanda, *supra* note 7, at 2–3.

[68] Freeman, *supra* note 67, at 1049–50.

[69] *Id.* Alan David Freeman provides an illustration of this principle through a fictional dialogue between "The Law" and "Black Americans" at the beginning of his article. *Id.* This viewpoint is largely associated with the Critical Legal Studies and Critical Race Theory schools of thought. *See, e.g.*, *id.* at 1049; Gotanda, *supra* note 7, at 62 nn.252 & 254.

[70] Freeman, *supra* note 67, at 1049–50; Gotanda, *supra* note 7, at 2–3.

rather than the result in a particular case.[71] From this perspective, the advantage of formal equality is that it prevents society from entrenching classifications and thus allowing them to become more important than they should be, or allowing them to be misused.[72] Advocates note that the demand for formal equality has grown out of the history of invidious misuse of classifications; therefore, society must be careful in invoking them.[73] Furthermore, invoking classifications at all may be inherently dangerous because it obscures the way in which the powerful dominate the powerless.[74] When society views the world according to classifications, society legitimates treating members of those classifications differently.[75] Those classifications thus are entrenched—they become normal and function as an excuse to treat members of different classifications disparately.[76]

By insisting on formal equality, advocates hope to encourage social change over time and work towards becoming a society in which classifications would no longer be grounds for treating people differently.[77] This approach seeks to protect the powerless from continued discrimination that could result from viewing the world in black and white—or female and male, or LGBTQ and heterosexual.[78] Thus, the debate becomes which method—anti-subordination or formal equality—better advances the interests of members of disadvantaged classifications, as well as the interests of society as a whole.[79]

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[71] *See* Valorie K. Vodjik, *Girls' Schools After* VMI: *Do They Make the Grade?*, 4 DUKE J. GENDER L. & POL'Y 69, 70–71, 83–84 (1997).

[72] *See id.* at 70–71.

[73] *See Bakke*, 438 U.S. at 361–62 (Brennan, J., concurring in part and dissenting in part) (discussing race); *see also* Orr v. Orr, 440 U.S. 268, 283 (1979) (Justice William Brennan's opinion for the Court, discussing gender); Vodjik, *supra* note 71, at 70–71; Carrie Corcoran, Comment, *Single-Sex Education After* VMI: *Equal Protection and East Harlem's Young Women's Leadership School*, 145 U. PA. L. REV. 987, 1030 (1997).

[74] *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 8–9 (1987).

[75] *Id.*

[76] *Id.* Catharine A. MacKinnon articulates this principle powerfully, stating that "[d]ifference is the velvet glove on the iron fist of domination." *Id.* at 8.

[77] *See* Vodjik, *supra* note 71, at 70–71.

[78] *See* MACKINNON, *supra* note 74, at 8–9; Vodjik, *supra* note 71, at 70–71.

[79] *Compare* Nemko, *supra* note 3, at 76–77 (advancing anti-subordination in single-sex schools), *with* Vodjik, *supra* note 71, at 70–71 (advancing formal equality in single-sex schools).

B. *The Argument for Anti-Subordination in Public Education: Short-Term Student Needs Matter Most*

In the context of public education, anti-subordination advocates argue that treating members of disadvantaged classifications differently may be necessary to achieve equality of educational opportunity.[80] These advocates support an idea articulated by black activist and intellectual W.E.B. DuBois: children need education, not integrated education or segregated education.[81] These advocates maintain that a fear of classifications must become secondary to a desire to meet each child's immediate educational needs, and therefore society should choose voluntary segregation over formal equality.[82]

Anti-subordination advocates argue that public school teachers may be biased against members of certain disadvantaged classifications, such as girls or black boys.[83] Alternatively, these teachers may simply lack the skills to deal with the specific issues these children face.[84] As a result, these children suffer disparate treatment, including a lack of attention and lower academic expectations for girls and increased levels of punishment and special or remedial education tracking for black boys.[85] Children also may face obstacles that other students create; for example, girls experience sexual harassment as early as junior high school.[86] Treatment from teachers, students, or both may result in lower levels of personal confidence.[87]

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[80] *See* Morgan, *supra* note 66, at 458–60; Nemko, *supra* note 3, at 76–77; Smith, *supra* note 3, at 2054–55.

[81] DuBois, *supra* note 3, at 335; *see* Morgan, *supra* note 66, at 458 n.309 (emphasizing the distinction drawn by DuBois between voluntary and compulsory segregation).

[82] *See* DuBois, *supra* note 3, at 330–31; Morgan, *supra* note 66, at 458–60; Nemko, *supra* note 3, at 76–77.

[83] For a discussion of girls in public schools, see AM. ASS'N OF UNIV. WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS: A STUDY OF MAJOR FINDINGS ON GIRLS AND EDUCATION 68 (1992) [hereinafter AAUW REPORT], and Elizabeth Fennema et al., *Teachers' Attributions and Beliefs About Girls, Boys, and Mathematics*, 21 EDUC. STUD. IN MATHEMATICS 55, 62, 66–67 (1990), *cited in* Nemko, *supra* note 3, at 55–56. For a discussion of black boys in public schools, see Smith, *supra* note 3, at 2041–42.

[84] *See* Smith, *supra* note 3, at 2041–42.

[85] For a discussion of girls in public schools, see AAUW REPORT, *supra* note 83, at 68–71, and Fennema et al., *supra* note 83, at 62, 66, *cited in* Nemko, *supra* note 3, at 55–56. For a discussion of black boys in public schools, see Smith, *supra* note 3, at 2041–43.

[86] AAUW REPORT, *supra* note 83, at 73, *cited in* Nemko, *supra* note 3, at 56–57.

[87] AAUW REPORT, *supra* note 83, at 11, *cited in* Nemko, *supra* note 3, at 56–58; Smith, *supra* note 3, at 2048–49.

The problems that members of these classifications face may even be institutional.[88] The scarcity of information in public education about black achievements, for instance, may prevent black children from obtaining a full sense of self-worth.[89] This problem extends beyond one teacher or set of students to the entire educational system.[90] Children who, as a result of their group membership, experience disadvantages with respect to teachers, other students, and the educational system as a whole may be less successful academically.[91]

Anti-subordination advocates argue that voluntary school segregation can be an effective tool for remedying the problems these children encounter.[92] For example, girls in single-sex schools have an opportunity to learn in an environment that challenges traditional sex roles.[93] Similarly, black youths in black schools have a chance to learn in an environment free from racism.[94] Students who have had a chance to take advantage of these opportunities have demonstrated, according to some research, increased academic achievement.[95] From an anti-subordination perspective, voluntary school segregation thus functions as a form of affirmative action for children who have been disadvantaged in past educational experiences.[96] It provides a compensatory function—an opportunity for these students to reach a level of achievement that they would have reached absent societal discrimination or disadvantage.[97]

Anti-subordination advocates address some of the criticisms of voluntarily segregated schools by emphasizing the positive experi-

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[88] John A. Powell, *Black Immersion Schools*, 21 N.Y.U. REV. L. & SOC. CHANGE 669, 683 (1995); *see* Smith, *supra* note 3, at 2048–49.

[89] *See* Richard Thompson Ford, Brown's *Ghost*, 117 HARV. L. REV. 1305, 1321 (2004); Powell, *supra* note 88, at 681–82; Smith, *supra* note 3, at 2048–49.

[90] Powell, *supra* note 88, at 683; Smith, *supra* note 3, at 2048–49; *see also* Dennis & Harlow, *supra* note 22, at 453 (describing the discrimination LGBTQ students face as an institutional problem).

[91] For a discussion of girls in public schools, see AAUW REPORT, *supra* note 83, at 22–32, and Susan Estrich, *For Girls' Schools and Women's Colleges, Separate Is Better*, N.Y. TIMES MAG., May 22, 1994, at 39, *cited in* Nemko, *supra* note 3, at 58. For a discussion of black boys in public schools, see Powell, *supra* note 88, at 683, and Smith, *supra* note 3, at 2042–43.

[92] *See* Nemko, *supra* note 3, at 59; Smith, *supra* note 3, at 2043.

[93] Nemko, *supra* note 3, at 63.

[94] *See* Smith, *supra* note 3, at 2048–49.

[95] *See* Nemko, *supra* note 3, at 59–61; Smith, *supra* note 3, at 2048.

[96] *See VMI*, 518 U.S. at 533; Corcoran, *supra* note 73, at 1021–29 (discussing gender); *see also* Greenfeld, *supra* note 18, at 374–78 (articulating and criticizing this argument in the context of race).

[97] *See VMI*, 518 U.S. at 533; Corcoran, *supra* note 73, at 1021–29; Greenfeld, *supra* note 18, at 374–78.

ences of students who attend them.[98] Rather than stigmatizing the students who attend or reinforcing negative stereotypes, these schools provide an opportunity for students to learn in a modern, alternative environment that helps them fight stereotypes.[99] The true stigma exists in the disparate treatment these children face at their integrated public schools.[100] Furthermore, students elect to attend voluntarily segregated schools.[101] Unlike traditionally segregated schools, which enforce a discriminatory state agenda, these schools simply provide an opportunity and a choice.[102] Ultimately, anti-subordination advocates urge society to prioritize the real educational needs of real children who face obstacles in public schools over any perceived abstract need to treat them the same as everyone else.[103]

C. *The Argument for Formal Equality in Public Education: Long-Term Societal Consequences Matter Most*

Opponents of voluntarily segregated schools, in contrast, maintain that any kind of segregation is inherently dangerous.[104] These advocates argue that segregation encourages society to think in terms of classifications, which will result in stereotyping despite good intentions to the contrary.[105] Segregation may also be inherently stigmatizing.[106] Proponents of formal equality over anti-subordination believe that separate but equal is always unequal, and public education has no place for segregated schools, whether enrollment is voluntary or not.[107]

Formal equality advocates argue that voluntary school segregation entrenches the classifications that serve as the root of the prob-

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[98] *See* Nemko, *supra* note 3, at 63; Smith, *supra* note 3, at 2050–51.

[99] *See* Nemko, *supra* note 3, at 63; Smith, *supra* note 3, at 2050–51.

[100] *See* DuBois, *supra* note 3, at 330–31.

[101] Nemko, *supra* note 3, at 63. Justice Clarence Thomas's concurring opinion, in 1995 in *Missouri v. Jenkins*, explains that only state-enforced segregation is harmful; if blacks only could achieve a quality education through integration, then that would imply that blacks are inferior. *See* 515 U.S. 70, 118–23 (1995) (Thomas, J., concurring). The problem with segregation is therefore not the separation itself, but the state enforcement. *See id.* (Thomas, J., concurring).

[102] *See* Nemko, *supra* note 3, at 63; Smith, *supra* note 3, at 2014–15.

[103] *See* DuBois, *supra* note 3, at 335; Nemko, *supra* note 3, at 76–77; Smith, *supra* note 3, at 2054–55. For a succinct, straightforward argument in favor of HMHS, see generally Rebecca Bethard, Comment, *New York's Harvey Milk School: A Viable Alternative*, 33 J.L. & Educ. 417 (2004).

[104] *See* Cummings, *supra* note 18, at 725–26; Vodjik, *supra* note 71, at 70–71.

[105] *See* Vodjik, *supra* note 71, at 70–71.

[106] *See* Cummings, *supra* note 18, at 725–26.

[107] *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Cummings, *supra* note 18, at 725; Vodjik, *supra* note 71, at 70–71.

lem.[108] In the United States, segregated schooling is rooted historically in discrimination.[109] Although voluntary segregation proposals today may spring from an anti-subordination motive rather than an oppressive one, the result is the separation of children according to classifications.[110] The distinction between these motives may be lost on society because the institutions look similar.[111] Most people will see only that children belonging to disadvantaged classifications are separated from other children, with state approval.[112] Separation based on classifications, therefore, may appear natural or normal.[113] Voluntary school segregation thus promotes dividing people according to classifications, which may encourage society to view those classifications as reasons to treat people differently.[114] In this way, even the best-intentioned proposal for voluntary school segregation may function as an invitation to discrimination.[115]

Formal equality advocates also maintain that the practice of segregation stigmatizes the children who are segregated, and they cite a wealth of social science data in the context of state-mandated segregation as support.[116] According to this research, segregation unfairly burdens members of segregated groups because they alone must experience the dissonance between the ideals of democracy and the reality of state-mandated segregation.[117] Segregation is a particular source of difficulty for those in the minority.[118] Segregated minorities often experience disturbing feelings, such as a sense of inferiority, internal conflict regarding self-worth, aggressiveness, martyrdom, sub-

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[108] *See* Vodjik, *supra* note 71, at 70–71, 83–84.

[109] *See id.* at 83–84 (discussing single-sex schools, which historically have been premised on the belief that men and women had different educational needs); *see also* Cummings, *supra* note 18, at 725–26 (alluding to the racial segregation that *Brown* dismantled).

[110] *See* Cummings, *supra* note 18, at 725–26; Vodjik, *supra* note 71, at 70–71, 83–84.

[111] *See* Vodjik, *supra* note 71, at 70–71, 83–84.

[112] *See id.*

[113] *See id.*

[114] *See id.* at 70–71.

[115] *See id.*

[116] *See* Cummings, *supra* note 18, at 725–26, 728–33. Richard Cummings cites, in particular, the work of social scientist Dr. Kenneth Clark on racial segregation, which the U.S. Supreme Court used as support in *Brown*. *Id.* at 730–31; *see* 347 U.S. at 494 n.11. The validity of this research has been the subject of much controversy. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 450–51 (4th ed. 2001); *see* Cynthia Fuchs Epstein, *Multiple Myths and Outcomes of Sex Segregation*, 14 N.Y.L. SCH. J. HUM. RTS. 185, 191 (1997) (questioning the validity of social science data regarding single-sex education). *But see* Dennis & Harlow, *supra* note 22, at 455 (suggesting that stigma would be problem of HMHS).

[117] Cummings, *supra* note 18, at 730–31.

[118] *Id.* at 730.

missiveness, and a tendency to withdraw.[119] Segregation results in a distorted perception of reality and perpetuates a vicious cycle in which disparate treatment begets negative effects which serve as a basis for more disparate treatment.[120] Furthermore, those in the majority (that is not segregated) experience negative feelings ranging from increased hostility to internal conflict.[121] Although the social science data indicating these effects is specific to state-mandated segregation, formal equality advocates believe it is unlikely that state-supported segregation in the form of voluntary school segregation would produce significantly different results.[122]

Formal equality advocates insist that segregation is inherently invidious.[123] It shapes the way society views members of the segregated classifications, and it shapes the way the members of those classifications view themselves.[124] In a country that has spent years fighting segregation on the premise that separate can never be equal, any segregation, even voluntary segregation, is a defeat for equality.[125] From the perspective of formal equality advocates, voluntary segregation is tantamount to giving up on the possibility of achieving integrated schools that provide equal educational opportunity for all children.[126]

II. Equal Protection and the U.S. Supreme Court

Analyzing the constitutionality of HMHS in the context of the anti-subordination versus formal equality debate requires sifting through fifty years of equal protection case law and applying it to this novel situation.[127] The U.S. Supreme Court has made powerful statements about state-mandated school segregation on the basis of race and has recently addressed segregation on the basis of gender as well.[128] It is unclear, however, how this case law applies to voluntary

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[119] *Id.*

[120] *Id.*

[121] *Id.* at 731.

[122] *See* Cummings, *supra* note 18, at 725–26.

[123] *See id.* at 730; Vodjik, *supra* note 71, at 70–71, 83–84.

[124] *See* Cummings, *supra* note 18, at 730; Vodjik, *supra* note 71, at 70–71.

[125] *See* Cummings, *supra* note 18, at 725.

[126] Ford, *supra* note 89, at 1331–32; Vodjik, *supra* note 71, at 94.

[127] *See* United States v. Virginia, 518 U.S. 515, 533–34 (1996) (*VMI*); Cooper v. Aaron, 358 U.S. 1, 16 (1958); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[128] *See VMI*, 518 U.S. at 533–34; *Cooper*, 358 U.S. at 16; *Brown*, 347 U.S. at 495.

school segregation.[129] The Court also has yet to address school segregation on the basis of sexual orientation, although lower courts have addressed segregation on this basis in the context of the armed forces.[130] Finally, each classification—race, gender, and sexual orientation—requires a different level of scrutiny in equal protection analysis.[131] The level of scrutiny also depends, in part, on whether there is discriminatory intent or only discriminatory impact involved.[132] Examining cases from these different contexts provides a background for analyzing this new public education equal protection problem.[133]

A. *The Push Towards Integration in Public Education*

1. Integration and Race: Separate but Equal Can Never Be Equal

In 1954, in the seminal case of *Brown v. Board of Education*, the U.S. Supreme Court held that separate but equal on the basis of race is inherently unequal in public education.[134] Many scholars agree that *Brown* inspired the civil rights movement and continues to be the Court's definitive statement on the meaning of equal protection.[135] *Brown* is also an example of anti-subordination and formal equality working in tandem to achieve equal opportunity in public education

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[129] *See VMI*, 518 U.S. at 533–34; *Cooper*, 358 U.S. at 16; *Brown*, 347 U.S. at 495. The Bush Administration's No Child Left Behind Act of 2001 indicates that single-sex public education is acceptable as long as equivalent classrooms and facilities are available. *See* 20 U.S.C.A. § 7215(a)(23) (West 2003). Advocates disagree, however, about whether this is constitutional. *Compare* Erin C. Logsdon, *"No Child Left Behind" and the Promotion of Single-Sex Public Education in Primary and Secondary Schools: Shattering the Glass Ceilings Perpetuated by Coeducation*, 32 J.L. & EDUC. 291, 295–96 (2003) (arguing for constitutionality), *with* James M. Sullivan, Note, *The Single-Sex Education Choice Facing School Districts After the No Child Left Behind Act of 2001 Is Not the One That Congress Intended*, 10 GEO. J. ON POVERTY L. & POL'Y 381, 412 (2003) (questioning constitutionality).

[130] *See* Able v. United States, 155 F.3d 628, 636 (2d Cir. 1998). For descriptions of the discrimination (not segregation) facing LGBTQ students in schools, see Dennis & Harlow, *supra* note 22, at 448–53, and Eric Rofes, *Opening Up the Classroom Closet: Responding to the Educational Needs of Gay and Lesbian Youth*, 59 HARV. EDUC. REV. 444, 444–45 (1989).

[131] *See VMI*, 518 U.S. at 533 (requiring heightened or intermediate scrutiny for gender); Romer v. Evans, 517 U.S. 620, 631–32 (1996) (requiring apparent rational basis scrutiny for sexual orientation); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (requiring strict scrutiny for race).

[132] *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (explaining that discriminatory impact alone does not trigger heightened scrutiny).

[133] *See VMI*, 518 U.S. at 533–34; *Cooper*, 358 U.S. at 16; *Brown*, 347 U.S. at 495; *Able*, 155 F.3d at 636.

[134] 347 U.S. at 495.

[135] *See* Cummings, *supra* note 18, at 725; Ford, *supra* note 89, at 1330–31.

for all students, at least with respect to access.[136] The case thus demonstrates the power of a decision that unites both the anti-subordination and formal equality theories.[137]

In *Brown*, black students filed a number of class action lawsuits against local school districts.[138] The plaintiffs sought admission to local schools which excluded them based on race.[139] The Court unanimously held that racial segregation in public schools denied equal opportunity for the excluded children, regardless of whether there were substantially equivalent educational facilities available.[140]

The decision in *Brown* emphasized the fundamental importance of education.[141] More importantly, though, the decision focused on the negative effects of segregation.[142] The Court rejected the theory presented in *Plessy v. Ferguson* that the badge of inferiority blacks perceived in segregation was merely a construction invented by blacks.[143] Rather, the Court recognized segregation's stigma, explaining that segregating black students "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[144] State-mandated segregation therefore violated the Fourteenth Amendment's equal protection guarantee.[145]

Brown is not only influential precedent, but it is also an example of anti-subordination and formal equality working together.[146] Requiring school districts to admit blacks supported anti-subordination because the Court demanded that the state no longer use segregation as

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[136] *See* Nemko, *supra* note 3, at 50–51.

[137] *See id.*

[138] 347 U.S. at 486.

[139] *Id.* at 487.

[140] *Id.* at 493.

[141] *Id.* at 493–94. The Court, however, did not acknowledge education as a fundamental right under the U.S. Constitution; it only claimed that when a state sought to provide public education it must do so on an equal basis. *See id.*; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (noting that education is not a fundamental right guaranteed by the U.S. Constitution).

[142] *See Brown*, 347 U.S. at 493–95.

[143] *Id.* at 494–95; Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[144] *Brown*, 347 U.S. at 494. The Court used social science research to support its claims, in particular, the work of Dr. Kenneth Clark. *Id.* at 494 n.11; *see also supra* note 116 and accompanying text.

[145] *Brown*, 347 U.S. at 495. The Court in *Brown* evaluated the case on the basis of strict scrutiny, which requires that the state may discriminate on the basis of race only if the discrimination is narrowly tailored to achieve a compelling governmental interest. *Adarand*, 515 U.S. at 227; *see Brown*, 347 U.S. at 492–95.

[146] Nemko, *supra* note 3, at 50–51; *see* 347 U.S. at 492–95.

a tool of racial oppression.[147] The Court thus sought to ensure the equal protection of members of this disadvantaged classification.[148] At the same time, it served formal equality because the state was required to treat blacks and whites alike by teaching students together in the same schools.[149] The Court thus sought to ensure, at least in theory, that members of different classifications received the same education from the state.[150] In principle, *Brown* arguably stands for a color blind ideal, though one which considers social context in achieving that objective.[151] At the time *Brown* was decided, it was thus impossible in practice to separate anti-subordination and formal equality.[152]

The Court, in 1958, expanded *Brown* when it decided *Cooper v. Aaron*, which held that private bias, and even preservation of law and order, were not justifications for preventing constitutionally mandated integration.[153] This case was a response to the actions of Arkansas government officials, notably the Governor of Arkansas, Orval Faubus, who ordered the state National Guard to prevent nine students from attending the newly integrated Central High School in Little Rock.[154] The students were not admitted until several weeks later when President Eisenhower ordered federal troops to enforce integration.[155] Federal National Guardsmen soon replaced the troops and remained at Central High for the rest of the school year.[156]

Several months later, the school board and the superintendent filed a petition with the district court to postpone desegregation.[157] The state argued that public hostility to the presence of black children in schools with white children made it impossible to educate its students competently.[158] The district court found, and the U.S. Supreme Court acknowledged, a situation of extreme tension and turmoil, including incidents of violence towards the students.[159] Yet the Court held that the state could not preserve law and order by denying

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[147] Nemko, *supra* note 3, at 50–51; *see Brown*, 347 U.S. at 492–95.
[148] Nemko, *supra* note 3, at 50–51; *see Brown*, 347 U.S. at 492–95.
[149] Nemko, *supra* note 3, at 50–51; *see Brown*, 347 U.S. at 492–95.
[150] *See Brown*, 347 U.S. at 492–95; Nemko, *supra* note 3, at 50–51.
[151] *See* 347 U.S. at 492–95; Nemko, *supra* note 3, at 50–51.
[152] *See* 347 U.S. at 492–95; Nemko, *supra* note 3, at 50–51.
[153] *See Cooper*, 358 U.S. at 16.
[154] *Id.* at 7–12.
[155] *Id.* at 12.
[156] *Id.*
[157] *Id.*
[158] *Cooper*, 358 U.S. at 12.
[159] *Id.* at 13, 15.

black students their constitutional rights.[160] The Court implicated the state in contributing to the intolerable situation in the school.[161] More fundamentally, though, the Court maintained that disagreement with constitutional principles is not reason enough to let those principles yield.[162] For the Court, equal protection principles trumped hostility and even violence.[163]

2. Integration and Gender: No More Perpetuation of the Legal, Social, and Economic Inferiority of Women

Although not as far-reaching as the history of racial discrimination, the history of gender discrimination in public education is significant.[164] In 1996, in *United States v. Virginia* (*VMI*), the U.S. Supreme Court decided an important equal protection case with regard to gender discrimination in public education when it held that Virginia must admit women to a prestigious, all-male, public military academy.[165] In this case, a woman sought admittance to the Virginia Military Institute ("VMI").[166] The Fourth Circuit Court of Appeals offered the state three choices: admit women to VMI, create parallel programs or institutions, or give up state financial support and become a private institution that can discriminate at will.[167] Virginia chose to create a separate program for women, the Virginia Women's Institute of Leadership ("VWIL").[168] VWIL was not only academically inferior but was premised on a cooperative educational method entirely distinct from the adversarial military model utilized at VMI.[169]

Overturning the lower courts, the U.S. Supreme Court found a denial of equal protection because VWIL was an inadequate substitute for VMI.[170] It remains an open question whether the Court would

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[160] *Id.* at 16.

[161] *Id.* at 15.

[162] *Id.* at 6, 16.

[163] *Cooper*, 358 U.S. at 6, 16, 19–20.

[164] *See* Nemko, *supra* note 3, at 68–72.

[165] *VMI*, 518 U.S. at 534. Gender is subject to heightened or intermediate scrutiny upon equal protection review, meaning that the state must provide an exceedingly persuasive justification for discriminating on the basis of gender that is substantially related to the achievement of important governmental objectives. *See id.* at 533.

[166] *Id.* at 523.

[167] *Id.* at 525–26. As a private institution, VMI would have had the freedom to discriminate based on gender free from the constitutional equal protection limitations that apply to state actors. *See id.*

[168] *Id.* at 526–28.

[169] *Id.*

[170] *VMI*, 518 U.S. at 534.

have approved a separate but truly equal institution for women.[171] Yet the Court clarified that states may no longer use gender classifications "to create or perpetuate the legal, social, and economic inferiority of women," though they may use them to compensate women for past discrimination.[172] This language suggests that courts may consider anti-subordination in equal protection problems involving gender.[173]

The Court in *VMI* thus arguably accomplished a similar feat as it did in *Brown*.[174] It ordered the admission of women to an elite male institution, overcoming a form of gender oppression.[175] It also demanded that women and men have equal access to educational opportunities.[176] As in *Brown*, the Court employed both anti-subordination and formal equality together in a public education equal protection problem.[177]

B. *The Push for Exclusion Based on Sexual Orientation in the Military*

Unlike race or gender, there is no similarly explicit history of exclusion from public education with respect to sexual orientation.[178] Sexual orientation is a classification that can apply to people from any race and either gender.[179] It is a trait that others may not know about, so it does not automatically present itself as a reason to treat someone differently.[180] Members of this classification, however, are sometimes excluded from participation in another public institution—the military.[181] The government's "don't ask, don't tell" policy regarding homosexuality requires that the government not ask applicants to the armed forces about their sexual orientation.[182] Although sexual orientation itself cannot be a basis for rejection, homosexual acts and statements indicating a propensity to engage in homosexual acts may be bases for disqualification.[183] In 10 U.S.C. § 654, Congress describes

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[171] *See id.* Justice Ruth Bader Ginsburg focused on the fact that VWIL did not provide equal opportunity—not that it could not provide equal opportunity. *See id.*

[172] *See id.* at 533–34.

[173] Morgan, *supra* note 66, at 415–17; *see VMI*, 518 U.S. at 533–34.

[174] *See VMI*, 518 U.S. at 533–34; *Brown*, 347 U.S. at 492–95.

[175] *VMI*, 518 U.S. at 533–34; *see Brown*, 347 U.S. at 492–95.

[176] *VMI*, 518 U.S. at 533–34; *see Brown*, 347 U.S. at 492–95.

[177] *See VMI*, 518 U.S. at 533–34; *Brown*, 347 U.S. at 492–95.

[178] *See supra* note 130 and accompanying text.

[179] *See* Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools*, 24 GOLDEN GATE U. L. REV. 67, 70–71 (1994).

[180] *See id.*

[181] *See* 10 U.S.C. § 654 (2000); *Able*, 155 F.3d at 636.

[182] STONE ET AL., *supra* note 116, at 652.

[183] *See* 10 U.S.C. § 654(b); STONE ET AL., *supra* note 116, at 652.

the policy within the armed forces as preserving the "high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."[184] The statute also describes the bases for expelling LGBTQ service members who violate this policy.[185]

In 1998, in *Able v. United States*, the Second Circuit Court of Appeals upheld the military's policy towards LGBTQ service members against an equal protection challenge.[186] In preserving the right of the military to discriminate on the basis of sexual orientation, the court held that the military's desire to maintain unit cohesion, privacy, and the reduction of sexual tensions justified excluding homosexuals from this setting.[187] Essentially, the court held that bias against LGBTQ service members justified excluding them because the special nature of the military setting requires the subordination of personal interests to the needs of the service.[188] Because negative feelings towards homosexual service members could disrupt unit cohesion, the military's discrimination against LGBTQ service members is permissible.[189] The court of appeals thus rejected the U.S Supreme Court's reasoning in *Cooper* as applied in this particular context—bias may be a reason to exclude LGBTQ men and women from the military, even if it is not a reason to exclude blacks from public schools.[190]

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[184] 10 U.S.C. § 654(a)(14).

[185] *Id.* § 654(b).

[186] 155 F.3d at 636. The court decided the case using rational basis review, which requires only that the government's discrimination bear a rational relationship to a legitimate government interest. *Id.* at 632. The court decided this case under the equal protection component of the Due Process Clause of the Fifth Amendment, which is the federal equivalent of the Equal Protection Clause of the Fourteenth Amendment as applied to states. *See id.* at 630; *see also* U.S. CONST. amend. V; Bolling v. Sharpe, 347 U.S. 497, 498–500 (1954) (invalidating public school segregation in the District of Columbia on the basis of the equal protection component of the Due Process Clause of the Fifth Amendment).

[187] *Able*, 155 F.3d at 635–36 (citing 10 U.S.C. § 654).

[188] *Id.* at 632.

[189] *Id.* at 632–36.

[190] *Compare Cooper*, 358 U.S. at 16 (refusing to permit discrimination), *with Able*, 155 F.3d at 632–36 (permitting discrimination based on sexual orientation). It is important to note that the military once argued that it was necessary to exclude blacks from military service in order to achieve unit cohesion. *See, e.g.*, Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1485–88 (2000) (comparing the military's justifications for excluding potential service members on the bases of sexual orientation and race).

C. *Scrutiny: How Closely Will Courts Evaluate an Equal Protection Claim?*

1. Sexual Orientation: Don't Ask, Don't Tell What Level of Scrutiny Applies

Although the *Able* court used rational basis scrutiny to evaluate an equal protection problem regarding sexual orientation, it is unclear where the U.S. Supreme Court stands today on the level of scrutiny that applies to this classification.[191] In two relatively recent cases, *Romer v. Evans*, in 1996, and *Lawrence v. Texas*, in 2003, the Court suggested a move towards applying a heightened level of scrutiny when sexual orientation is a basis for discrimination.[192] It is generally difficult to defeat legislation using deferential rational basis review.[193] Yet in *Romer* and *Lawrence*, the Court invalidated legislation discriminating on the basis of sexual orientation without claiming it used anything more than rational basis analysis.[194]

In *Romer*, the Court refused to uphold an amendment to the Colorado state constitution that attempted to remove the possibility of protected status based on sexual orientation in Colorado law.[195] The Court found that the amendment was so far reaching, yet so narrowly targeted towards a particular class of persons, that it was unexplainable on the basis of anything other than animus.[196] Scholars disagree about whether the Court applied rational basis scrutiny or something more when it decided *Romer*.[197]

In *Lawrence*, the Court struck down a law prohibiting homosexual, but not heterosexual, sodomy on substantive due process grounds, thus overruling its 1986 decision in *Bowers v. Hardwick*, which would have sustained such a law.[198] Although the Court decided *Law-*

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[191] *See Romer*, 517 U.S. at 632; Baker v. State, 744 A.2d 864, 872 n.5 (Vt. 1999). In 1999, in *Baker v. State*, Justice Jeffrey Amestoy of the Vermont Supreme Court discussed the U.S. Supreme Court's unacknowledged divergence from traditional rational basis scrutiny in cases including *Romer*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985), and *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534–35 (1973). *Baker*, 744 A.2d at 872 n.5 (citing Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 59–64 (1996)).

[192] *See* Lawrence v. Texas, 539 U.S. 558, 574–77 (2003); *Romer*, 517 U.S. at 631–32.

[193] *See Baker*, 744 A.2d at 872 n.5; *see also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 594 (1979) (illustrating traditional rational basis review).

[194] *See Lawrence*, 539 U.S. at 578; *Romer*, 517 U.S. at 631–32.

[195] 517 U.S. at 635.

[196] *Id.* at 632.

[197] STONE ET AL., *supra* note 116, at 653–54; *see Baker*, 744 A.2d at 872 n.5.

[198] *Lawrence*, 539 U.S. at 578; *see* U.S. CONST. amend. XIV, § 1; Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

rence under the Due Process Clause of the Fourteenth Amendment, rather than the Equal Protection Clause, it appears possible that the Court was more disposed to invalidate the law because it discriminated based on sexual orientation.[199]

The U.S. Supreme Court has departed from traditional rational basis review before without committing to a higher level of scrutiny.[200] But in the case of gender, the Court actually applied heightened scrutiny before it admitted to abandoning rational basis review with respect to the classification.[201] Thus, it is currently unclear whether the Court is moving away from traditional rational basis review in general or moving towards establishing a higher level of scrutiny in equal protection problems involving sexual orientation, as it did with gender.[202]

2. The Importance of the Intent to Discriminate: Discriminatory Impact Is Unlikely to Be Enough

In determining what level of scrutiny applies in an equal protection problem, courts must consider another factor in addition to the classification in question—intent to discriminate or lack thereof.[203] The U.S. Supreme Court has articulated that discriminatory intent is required to trigger strict or heightened scrutiny in equal protection cases.[204] Courts will evaluate equal protection claims involving only discriminatory impact under rational basis scrutiny.[205] Cases lacking discriminatory intent thus are unlikely to constitute equal protection violations because rational basis scrutiny is generally quite deferential to the

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[199] *See Lawrence*, 539 U.S. at 575 (discussing the link between equal protection and due process with respect to discrimination). Justice Sandra Day O'Connor would have decided the case on equal protection grounds. *Id.* at 579 (O'Connor, J., concurring) (discussing discrimination); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948–49, 953, 959 (Mass. 2003) (citing *Lawrence* as support in declaring the Massachusetts ban on same-sex marriage unconstitutional on state constitutional grounds).

[200] *See Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534.

[201] STONE ET AL., *supra* note 116, at 653–54. *Compare* Craig v. Boren, 429 U.S. 190, 197 (1976) (articulating that statute that discriminates on basis of gender "must serve important governmental objectives and must be substantially related to the achievement of those objectives" to survive equal protection challenge), *with* Reed v. Reed, 404 U.S. 71, 76 (1971) (striking down statute that discriminated on basis of gender because statute bore no "rational relationship" to state objective advanced by statute).

[202] *See Lawrence*, 539 U.S. at 574–77; *Romer*, 517 U.S. at 631–32; STONE ET AL., *supra* note 116, at 653–54.

[203] *See Davis*, 426 U.S. at 242.

[204] *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 279–80 (1979); *Davis*, 426 at 242.

[205] *See Feeney*, 442 U.S. at 279–80; *Davis*, 426 U.S. at 242.

government.[206] Therefore, absent discriminatory intent, it is difficult to bring a successful challenge under the Equal Protection Clause.[207]

In 1976, in *Washington v. Davis*, the U.S. Supreme Court held that a qualifying test given to police applicants in the District of Columbia did not violate equal protection even though it had a disproportionate impact on black applicants.[208] The Court explained that a law's discriminatory impact may indicate invidious discrimination in certain cases, such as when a facially neutral law is applied in a clearly discriminatory manner, but that disproportionate impact alone is not enough to trigger strict scrutiny.[209]

The Court cited the 1886 case of *Yick Wo v. Hopkins* as an example of a case in which a facially neutral law applied in a discriminatory fashion may violate equal protection.[210] In *Yick Wo*, the Court found an equal protection violation when government officials applied a facially neutral building regulation selectively to Chinese-American citizens.[211] The Court found no parallel in *Davis*, in which the results of a test, rather than the conscious application of a law, produced the discriminatory impact.[212] Thus, government action that has a disproportionate impact based on a classification may need to survive only rational basis review.[213] Absent intentional discrimination, strict scrutiny does not apply and courts are unlikely to find an equal protection violation.[214] The presence or absence of discriminatory intent thus may have a significant influence on the outcome of an equal protection problem.[215]

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[206] *See Feeney*, 442 U.S. at 279–80; *Davis*, 426 U.S. at 242.

[207] *See Feeney*, 442 U.S. at 279–80; *Davis*, 426 U.S. at 242.

[208] 426 U.S. at 245–46.

[209] *Id.* at 241–42.

[210] *Id.* at 241 (citing Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886)).

[211] 118 U.S. at 374.

[212] *See* 426 U.S. at 245–46.

[213] *See id.* at 242; *see also* McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (describing the intent requirement in disproportionate impact case regarding the death penalty).

[214] *See McCleskey*, 481 U.S. at 292; *Davis*, 426 U.S. at 242; *see also Feeney*, 442 U.S. at 279–80 (extending the doctrine to gender).

[215] *See McCleskey*, 481 U.S. at 292; *Feeney*, 442 U.S. at 279–80; *Davis*, 426 U.S. at 242.

III. Analysis: Anti-Subordination Must Be Reunited with Formal Equality to Achieve True Equal Protection

Two important questions present themselves in evaluating HMHS from an equal protection perspective.[216] First, is HMHS constitutional?[217] Second, is HMHS the best solution to the problems LGBTQ youths face in public schools?[218]

Although HMHS is likely constitutional, it is not the best strategy for pursuing equal protection, particularly over time.[219] HMHS prioritizes anti-subordination over formal equality, addressing the immediate needs of at-risk youth rather than permitting them to face harassment at their current public schools.[220] Voluntary school segregation, however, is unlike affirmative action, which also prioritizes anti-subordination over formal equality, because voluntary segregation increases the danger of entrenching classifications.[221] Regardless of its motive, voluntary school segregation sends the negative message that hostility justifies segregation.[222] This message absolves public schools of their duty to solve the discrimination problem, allowing it to continue.[223] Voluntary segregation also creates stigma.[224] The message and results of voluntary segregation are thus the same as involuntary segregation in terms of the effect on society as a whole.[225] From this perspective, voluntary school segregation does not appear dramatically different from the military's "don't ask, don't tell" policy.[226]

In order to address discrimination against LGBTQ students but avoid the negative implications of segregation, society must reunite anti-subordination and formal equality by insisting that integrated

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[216] *See* United States v. Virginia, 518 U.S. 515, 533–34 (1996) (*VMI*); Cooper v. Aaron, 358 U.S. 1, 16 (1958); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); Able v. United States, 155 F.3d 628, 636 (2d Cir. 1998).

[217] *See VMI*, 518 U.S. at 533–34; *Cooper*, 358 U.S. at 16; *Brown*, 347 U.S. at 495; *Able*, 155 F.3d at 636.

[218] *See VMI*, 518 U.S. at 533–34; *Cooper*, 358 U.S. at 16; *Brown*, 347 U.S. at 495; *Able*, 155 F.3d at 636.

[219] *See infra* notes 231–321 and accompanying text; *see also* Dennis & Harlow, *supra* note 22, at 453–56 (discussing and criticizing the original Harvey Milk program); Ford, *supra* note 89, at 1320.

[220] *See infra* notes 250–274 and accompanying text; *see also* Morgan, *supra* note 66, at 458–60; Nemko, *supra* note 3, at 76–77.

[221] *See infra* notes 250–274 and accompanying text.

[222] *See infra* notes 275–295 and accompanying text.

[223] *See infra* notes 275–295 and accompanying text.

[224] *See infra* notes 296–301 and accompanying text.

[225] *See infra* notes 275–321 and accompanying text.

[226] *See infra* notes 302–321 and accompanying text.

schools overcome discrimination from within.[227] This approach best encompasses the Fourteenth Amendment's dual ideals of treating people alike and providing equal protection for disadvantaged individuals.[228] Society must maintain that hostility is never a sufficient reason for segregation and demand that integrated schools become safe and supportive enough to meet the needs of LGBTQ students.[229] This unifying approach will ensure that schools address real student needs while assisting the transformation towards a society in which classifications no longer matter.[230]

A. *The Harvey Milk High School Should Survive a Constitutional Challenge*

HMHS would probably survive an equal protection challenge because the school's admissions policy lacks discriminatory intent based on sexual orientation.[231] The policy does not discriminate on this basis, but rather targets students who are in crisis.[232] Although the program is aimed towards LGBTQ students, heterosexual students are welcome to apply and to be considered for admission.[233] HMHS simply seeks to provide a safe, hate-free learning environment for at-risk students.[234] An equal protection challenge to HMHS, claiming that the school discriminates based on sexual orientation, probably would fail because heterosexual students are not excluded.[235]

The basis for discrimination against a potential HMHS student is thus not sexual orientation but the extent to which that student is at risk, for any reason.[236] That the school may attract a disproportionate number of LGBTQ students is a discriminatory impact problem requiring only rational basis scrutiny.[237] Under a rational basis analysis,

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[227] *See infra* notes 322–347 and accompanying text.

[228] *See infra* notes 322–347 and accompanying text.

[229] *See infra* notes 322–347 and accompanying text.

[230] *See infra* notes 322–347 and accompanying text.

[231] *See* McCleskey v. Kemp, 481 U.S. 279, 292 (1987); Personnel Adm'r v. Feeney, 442 U.S. 256, 279–80 (1979); Washington v. Davis, 426 U.S. 229, 242 (1976).

[232] HMI, *Q & A's on HMHS*, *supra* note 22.

[233] *Id.*

[234] *Id.*

[235] *See McCleskey*, 481 U.S. at 292; *Feeney*, 442 U.S. at 279–80; *Davis*, 426 U.S. at 242; HMI, *Q & A's on HMHS*, *supra* note 22. New York state Senator Ruben Diaz filed a lawsuit on August 13, 2003, claiming that HMHS violates educational rules against discriminating on the basis of sexual orientation. Gewertz, *supra* note 19, at 7; Associated Press, *Lawsuit Challenges Gay High School*, *at* http://www.cnn.com/2003/EDUCATION/08/14/gay.school.ap/index.html (Aug. 20, 2003).

[236] *See* HMI, *Q & A's on HMHS*, *supra* note 22.

[237] *See McCleskey*, 481 U.S. at 292; *Feeney*, 442 U.S. at 279–80; *Davis*, 426 U.S. at 242.

it appears that prioritizing admittance for at-risk youth bears a rational relationship to the legitimate state interest in providing safe educational opportunities for all students.[238] Thus, HMHS is unlikely to violate equal protection.[239]

Even if a court found that HMHS discriminates based on sexual orientation, the school is still likely to survive a constitutional challenge.[240] Under this scenario, it is possible to imagine a court finding that HMHS's facially neutral policy is applied in a discriminatory manner, systematically excluding heterosexual students.[241] Like in *Yick Wo v. Hopkins*, in which a facially neutral building ordinance was applied selectively to Chinese-Americans, this kind of activity may trigger a higher level of scrutiny than mere rational basis.[242] In this case, the higher level of scrutiny available for discrimination based on sexual orientation would be something more than rational basis, which the U.S. Supreme Court has potentially applied but not officially acknowledged.[243] And even if a court applied this slightly higher standard, discriminating based on sexual orientation in admissions appears to be rationally related to the legitimate state interest in providing safe educational opportunities to members of a disadvantaged group.[244]

Scrutiny has an ironic result in affirmative action-type situations—the higher the applicable standard of review, the more difficult it is to survive a constitutional challenge.[245] Thus, in affirmative action programs, it is easier to discriminate based on gender than based on race, even though race is supposed to warrant more protection as a classification, because gender's lower level of scrutiny results in greater flexibility for government action.[246] This is an example of strict formal equality's unreasonable results—without consideration of context, as anti-subordination requires, the group needing the most

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[238] *See McCleskey*, 481 U.S. at 292; *Feeney*, 442 U.S. at 279–80; *Davis*, 426 U.S. at 242.

[239] *See McCleskey*, 481 U.S. at 292; *Feeney*, 442 U.S. at 279–80; *Davis*, 426 U.S. at 242.

[240] *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (applying something more than rational basis scrutiny in the context of sexual orientation). Although the U.S. Supreme Court, in *Romer v. Evans*, invalidated the government action in question, it did so because the action was motivated by animus, unlike HMHS. *See* 517 U.S. at 632.

[241] *See Davis*, 426 U.S. at 241; Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).

[242] *See Davis*, 426 U.S. at 241; *Yick Wo*, 118 U.S. at 374.

[243] *See* Lawrence v. Texas, 539 U.S. 558, 574–77 (2003); *Romer*, 517 U.S. at 631–32.

[244] *See Romer*, 517 U.S. at 631–32 (invalidating state constitutional amendment on the basis of animus, which is not present in HMHS).

[245] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting); Nemko, *supra* note 3, at 40.

[246] *See Adarand*, 515 U.S. at 247 (Stevens, J., dissenting); Nemko, *supra* note 3, at 40.

protection gets the least protection.[247] In seeking to assist members of a classification that is granted less protection by courts, however, this strange outcome can be helpful.[248] Because sexual orientation demands an even lower level of scrutiny than gender, HMHS, an affirmative action-type program, should be held constitutional.[249]

B. *The Harvey Milk High School Is Not the Best Solution to the Problem of Discrimination Against LGBTQ Students*

1. Voluntary School Segregation Is Unlike Affirmative Action Because It Increases the Danger of Entrenching Classifications

Affirmative action and voluntary school segregation both prioritize anti-subordination over formal equality.[250] Affirmative action, however, does so in the context of integration, while voluntary school segregation clearly does not.[251] This crucial distinction enables affirmative action to temper the danger of entrenching classifications, while voluntary school segregation exacerbates it.[252] These two approaches, then, are not equally viable anti-subordination options.[253]

HMHS calls for anti-subordination in the context of voluntary school segregation.[254] Although such programs can be considered remedial or compensatory—like affirmative action—they present dangers that are missing in traditional affirmative action.[255] Advocates prioritize anti-subordination over formal equality in traditional affirmative action, treating members of different groups differently in order to promote substantive equal treatment.[256] But affirmative action in public education results in a diverse mix of members of dif-

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[247] *See Adarand*, 515 U.S. at 247 (Stevens, J., dissenting); Nemko, *supra* note 3, at 40.

[248] *See Adarand*, 515 U.S. at 247 (Stevens, J., dissenting); Nemko, *supra* note 3, at 40.

[249] *See Adarand*, 515 U.S. at 247 (Stevens, J., dissenting); Nemko, *supra* note 3, at 40.

[250] *Compare* Cummings, *supra* note 18, at 725–27, *and* Vodjik, *supra* note 71, at 70–71 (discussing the negative impact of segregation), *with* Grutter v. Bollinger, 539 U.S. 306, 329–33 (2003) (discussing the positive impact of affirmative action).

[251] *See Grutter*, 539 U.S. at 329–33; Cummings, *supra* note 18, at 725–27; Vodjik, *supra* note 71, at 70–71.

[252] *See Grutter*, 539 U.S. at 329–33; Cummings, *supra* note 18, at 725–27; Vodjik, *supra* note 71, at 70–71.

[253] *See Grutter*, 539 U.S. at 329–33; Cummings, *supra* note 18, at 725–27; Vodjik, *supra* note 71, at 70–71.

[254] *See* Morgan, *supra* note 66, at 458–60; Nemko, *supra* note 3, at 76–77; Smith, *supra* note 3, at 2054–55.

[255] *See supra* notes 250–253 and accompanying text.

[256] *See* Nemko, *supra* note 3, at 33–35.

ferent classifications learning together.[257] It thus creates, through anti-subordination, a world that looks like the ideal world in which affirmative action would no longer be necessary.[258] This encourages society to see the world not in black and white, female and male, but as a world in which people appear side by side.[259] It entrenches this diversity as normal.[260]

Affirmative action is thus aspirational because it works to create a world that would make the practice itself irrelevant.[261] Eventually, if affirmative action works, anti-subordination would no longer be necessary because members of groups would not be treated differently based on their group membership.[262] Formal equality—treating people alike—would then become all that is necessary to achieve true equality of opportunity.[263] The societal dangers of prioritizing anti-subordination over formal equality are therefore tempered by the integration that results from using affirmative action in public education.[264]

Voluntary school segregation, in contrast, encourages society to view the world according to classifications.[265] Advocates prioritize anti-subordination over formal equality in this scenario, treating students differently in order to provide them substantively equal educational opportunities.[266] Unlike traditional affirmative action, however, voluntary school segregation physically separates members of different classifications.[267] These classifications thus become sharper and more clearly defined—they become entrenched, and separating members of classifications from one another becomes normal.[268] Anti-subordination in this context does not promote a society in which classifications no longer matter because it further emphasizes these classifications.[269] It then becomes more likely that these

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[257] *See Grutter*, 539 U.S. at 329–33.

[258] *See id.*

[259] *See id.*

[260] *See* Nemko, *supra* note 3, at 19 (quoting LIVA BAKER, I'M RADCLIFFE! FLY ME! THE SEVEN SISTERS AND THE FAILURE OF WOMEN'S EDUCATION 15 (1976) (suggesting that the ultimate goal of women's colleges was to achieve gender equality to put themselves out of business)). Affirmative action, another measure supporting anti-subordination, appears to have a similar goal. *See id.*

[261] *See id.*

[262] *See id.*

[263] *See id.*

[264] *See Grutter*, 539 U.S. at 329–33.

[265] *See* Ford, *supra* note 89, at 1319; Vodjik, *supra* note 71, at 70–71.

[266] *See* Morgan, *supra* note 66, at 458–60; Nemko, *supra* note 3, at 76–77.

[267] *See* Cummings, *supra* note 18, at 725–26; Vodjik, *supra* note 71, at 83–84.

[268] *See* Vodjik, *supra* note 71, at 70–71, 83–84.

[269] *See* Ford, *supra* note 89, at 1308; Vodjik, *supra* note 71, at 70–71, 83–84.

classifications will be used as justifications for treating people differently.[270] The societal dangers of prioritizing anti-subordination over formal equality are therefore exacerbated in the context of voluntary school segregation.[271]

It is difficult to imagine how voluntary school segregation could ever result in a world in which classifications are irrelevant and formal equality is all that is necessary to achieve equality of opportunity.[272] Under this approach, the ideal will be forever out of reach.[273] Voluntary school segregation's societal cost is thus too high a price to pay, despite its immediate benefits.[274]

2. Hostility Should Never Justify Segregation: Voluntary or Involuntary, the Negative Message and Negative Effects on Schools and Society Are the Same

a. *Allowing Segregation Sends a Negative Message with a Negative Effect on Schools: Hostility Justifies Segregation*

Segregation in public education is unacceptable because the resulting message is the same regardless of whether the motive is anti-subordination or oppression, or whether the segregation is voluntary or involuntary—hostility towards a group justifies segregation.[275] This practice thus amounts to tolerating discrimination because it solves the problem by removing the targeted students rather than demanding that the discrimination stop.[276] In order to avoid endorsing this negative message that absolves public schools of their responsibility to fix the problem, society should embrace the idea that hostility is never reason enough to justify segregation in public schools.[277]

The case for HMHS is strong.[278] The statistics on discrimination against LGBTQ youths paint a disturbing picture of harassment and

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[270] *See* MACKINNON, *supra* note 74, at 8–9; Vodjik, *supra* note 71, at 70–71; *see also* Ford, *supra* note 89, at 1328–30 (arguing that HMHS encourages society to view differences between groups as intrinsic rather than as socially created).

[271] *See* Vodjik, *supra* note 71, at 70–71; *see also* Sharon E. Rush, *Lessons from and for "Disabled" Students*, 8 J. GENDER RACE & JUST. 75, 86 (2004).

[272] *See* Vodjik, *supra* note 71, at 70–71.

[273] *See id.*

[274] *See id.*

[275] *See Cooper*, 358 U.S. at 16; Ford, *supra* note 89, at 1332.

[276] *See* MACKINNON, *supra* note 74, at 8–9; Dennis & Harlow, *supra* note 22, at 456.

[277] *See Cooper*, 358 U.S. at 16; MACKINNON, *supra* note 74, at 8–9; Cummings, *supra* note 18, at 725–27; Dennis & Harlow, *supra* note 22, at 456; Vodjik, *supra* note 71, at 70–71.

[278] *See* HMI, *LGBTQ Youth Statistics*, *supra* note 25.

academic failure.[279] Yet hostility against these students should not justify segregating them.[280] In *Cooper v. Aaron*, the U.S. Supreme Court found that even violence against black students could not justify segregation; the public schools were required to fix the problem rather than avoid it.[281] Advocates should adopt this theory in fighting discrimination against LGBTQ students as well.[282]

HMHS admittedly can be distinguished from the circumstances in *Cooper* on two grounds.[283] First, the motive behind voluntary segregation is positive.[284] Anti-subordination advocates, not opponents of LGBTQ interests, are behind the development of the school.[285] This justification is unlike the post hoc rationalization displayed by the Arkansas school system in *Cooper*, in which government officials attempted to cloak racist motives in false concern for the students in question.[286] Furthermore, the segregation at issue is voluntary.[287] The state is not mandating it, only tolerating it; no student will be forced to attend.[288]

The resulting message, however, remains the same in either circumstance.[289] Hostility against LGBTQ students justifies segregating them.[290] Society therefore avoids dealing with the root of the problem, allowing discrimination to continue in public schools despite good intentions to the contrary.[291] This message, therefore, is not mere ideology—it has a concrete, negative result.[292] Even if society simultaneously works to overcome discrimination within integrated schools, as advocated by the Hetrick-Martin Institute (which helps to run HMHS), it is clear that removal itself functions as the immediate solution.[293] It is unclear, however, how students and teachers who exacerbate the problem will truly learn to overcome bias when the tar-

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[279] *See id.*

[280] Dennis & Harlow, *supra* note 22, at 456; *see Cooper*, 358 U.S. at 6, 16, 19–20.

[281] *See* 358 U.S. at 6, 16.

[282] *See id.*; Dennis & Harlow, *supra* note 22, at 456.

[283] *Compare* 358 U.S. at 7–12 (describing the facts of the case), *with* HMI, *About HMI & HMHS*, *supra* note 19 (describing the impetus for HMHS).

[284] *See* HMI, *About HMI & HMHS*, *supra* note 19.

[285] *See id.*

[286] *Compare Cooper*, 358 U.S. at 15–17 (describing the government's role in creating the problem), *with* HMI, *About HMI & HMHS*, *supra* note 19 (describing HMI's goals in creating HMHS).

[287] HMI, *Q & A's on HMHS*, *supra* note 22.

[288] *Id.*

[289] *See Cooper*, 358 U.S. at 6, 16, 19–20; Ford, *supra* note 89, at 1332.

[290] *See Cooper*, 358 U.S. at 6, 16, 19–20; HMI, *About HMI & HMHS*, *supra* note 19.

[291] *See* MacKinnon, *supra* note 74, at 8–9; Dennis & Harlow, *supra* note 22, at 456.

[292] *See* MacKinnon, *supra* note 74, at 8–9; Dennis & Harlow, *supra* note 22, at 456.

[293] *See* HMI, *Q & A's on HMHS*, *supra* note 22.

gets of bias are removed.[294] Supporting voluntary segregation thus endorses the message that hostility justifies segregation, a message that frees public schools from taking their duty to overcome discrimination against LGBTQ students seriously.[295]

b. *Segregation's Negative Effects on Society Remain the Same Whether Segregation Is Voluntary or Involuntary*

In addition to permitting discrimination in public schools to continue, voluntary school segregation also invites the negative effects on society that follow from prioritizing anti-subordination over formal equality in the context of segregation—entrenching classifications and creating stigma.[296] First, prioritizing anti-subordination over formal equality in the context of segregation creates a likelihood of entrenching classifications.[297] Second, voluntary school segregation may actually create stigma as well.[298] It appears possible that at least some students would feel stigmatized by attending a school like HMHS.[299] A gay 18-year-old high school graduate who faced harassment in his public school said about HMHS, "It's just segregation. That's not the solution. It says we are marginalized, and that's not fair."[300] Although other students emphasize that HMHS provided their only opportunity to graduate from school safely, the reaction of LGBTQ students who oppose HMHS indicates that society must take the possible harm of stigma seriously.[301]

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[294] *See* MacKinnon, *supra* note 74, at 8–9; Dennis & Harlow, *supra* note 22, at 456; *see also* Editorial, *The Harvey Milk High School*, N.Y. Times, Aug. 3, 2003, § 4, at 10 (stating that segregation does not solve the problem of discrimination). Richard Thompson Ford suggests that if someone is to be segregated, schools should remove the harassers, rather than the targets. Ford, *supra* note 89, at 1327.

[295] *See Cooper*, 358 U.S. at 16; MacKinnon, *supra* note 74, at 8–9; Dennis & Harlow, *supra* note 22, at 456.

[296] *See* MacKinnon, *supra* note 74, at 8–9; Cummings, *supra* note 18, at 725–27; Dennis & Harlow, *supra* note 22, at 456; Vodjik, *supra* note 71, at 70–71.

[297] *See supra* notes 250–274 and accompanying text (discussing the difference between affirmative action and voluntary school segregation).

[298] *See Brown*, 347 U.S. at 493–95; Cummings, *supra* note 18, at 725–26, 728–33; Dennis & Harlow, *supra* note 22, at 455; *see also supra* notes 116–122 and accompanying text.

[299] *See* Gewertz, *supra* note 19, at 7.

[300] *See id.*

[301] *See Brown*, 347 U.S. at 493–95; Dennis & Harlow, *supra* note 22, at 455; Gewertz, *supra* note 19, at 7.

c. *Supporting the Harvey Milk High School's Approach Is Inconsistent with Opposing "Don't Ask, Don't Tell" Because These Practices Endorse the Same Negative Message and Have the Same Negative Effects*

Allowing segregation because of bias against LGBTQ youths is reminiscent of allowing LGBTQ exclusion from the armed forces because these two practices endorse the same negative message that hostility justifies segregation.[302] Despite the different motivations behind these practices, the message to society remains the same, and the negative societal effects remain the same as well.[303] It is thus inconsistent to support HMHS and to oppose "don't ask, don't tell" if the message and effects of these two practices matter.[304]

The justification for the military's "don't ask, don't tell" policy is unpersuasive.[305] In the armed forces, private bias against LGBTQ service members outweighs the interests of those service members in military participation.[306] Rather than work to overcome the bias and allow full and equal participation of all citizens, the military seeks to avoid the problem by excluding LGBTQ service members when others react negatively to those service members' sexual orientation.[307] This perspective, endorsed by the Second Circuit Court of Appeals in *Able v. United States*, encourages society not only to see the world according to classifications, but to treat people differently because of them.[308] This runs counter to both of equal protection's two goals— treating people alike and providing protection for disadvantaged individuals.[309] LGBTQ advocates have criticized this divisive decision, which sacrifices inclusion to avoid conflict.[310]

Although excluding LGBTQ service members from the military differs from voluntary school segregation in important ways, as in the comparison with *Cooper*, the resulting message and effects are the

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[302] *See Able*, 155 F.3d at 636; Vodjik, *supra* note 71, at 70–71.

[303] *See* Cummings, *supra* note 18, at 725–26; Dennis & Harlow, *supra* note 22, at 456; Ford, *supra* note 89, at 1332; Vodjik, *supra* note 71, at 70–71.

[304] *See Able*, 155 F.3d at 636; Cummings, *supra* note 18, at 725–26; Dennis & Harlow, *supra* note 22, at 456; Vodjik, *supra* note 71, at 70–71.

[305] *Compare Cooper*, 358 U.S. at 16 (rejecting segregation), *with Able*, 155 F.3d at 636 (accepting "don't ask, don't tell").

[306] *Able*, 155 F.3d at 636.

[307] *See id.* at 632–36.

[308] *See id.*

[309] *See id.*; Hutchinson, *supra* note 43, at 619–23; Nemko, *supra* note 3, at 21.

[310] *See* Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 Ohio St. L.J. 867, 914–16 (2000).

same.[311] HMHS does not exclude LGBTQ students from school altogether; it merely provides a separate educational experience, and a voluntary one at that.[312] Additionally, the motive behind HMHS is to advance the interests of LGBTQ students rather than to exclude them.[313] Choosing to attend HMHS rather than an integrated school is thus clearly distinct from involuntary exclusion from the military.[314] Still, the same problem arises; hostility justifies separation in both contexts.[315] The negative effects of segregation—allowing discrimination to continue, entrenching classifications, and creating stigma—are still present.[316] Moreover, the context of public school makes the need for integration even more compelling.[317]

The Court in *Brown* emphasized the fundamental importance of education in that landmark decision: "Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship."[318] Because public education is so important, and because most American children participate in it, integration in public schools is arguably more important than in the military, in which relatively few people participate.[319] If voluntary school segregation became widespread, the societal impact could be much broader than the impact of "don't ask, don't tell."[320] It is therefore inconsistent to oppose "don't ask, don't tell" but to support voluntary school segregation, because the negative message and effects are the same in either circumstance.[321]

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[311] *See Cooper*, 358 U.S at 16; MACKINNON, *supra* note 74, at 8–9; Cummings, *supra* note 18, at 725–26; Vodjik, *supra* note 71, at 70–71.

[312] HMI, *Q & A's on HMHS*, *supra* note 22.

[313] HMI, *About HMI & HMHS*, *supra* note 19.

[314] *Compare Able*, 155 F.3d at 636 (addressing involuntary exclusion), *with* HMI, *About HMI & HMHS*, *supra* note 19 (addressing voluntary segregation).

[315] *See Able*, 155 F.3d at 636; HMI, *About HMI & HMHS*, *supra* note 19.

[316] *See* MACKINNON, *supra* note 74, at 8–9; Cummings, *supra* note 18, at 725–26; Vodjik, *supra* note 71, at 70–71.

[317] *See Brown*, 347 U.S. at 493–94; Ford, *supra* note 89, at 1310–11.

[318] *Brown*, 347 U.S. at 493.

[319] *Compare Brown*, 347 U.S. at 493–94 (addressing public education), *with Able*, 155 F.3d at 636 (addressing the military).

[320] *See Brown*, 347 U.S. at 493.

[321] *See id.* at 493–94; *Able*, 155 F.3d at 636; MACKINNON, *supra* note 74, at 8–9; Cummings, *supra* note 18, at 725–27; Ford, *supra* note 89, at 1332; Vodjik, *supra* note 71, at 70–71.

3. A Better Alternative: Moving Towards True Equality of Opportunity by Reuniting Anti-subordination with Formal Equality

In *Brown v. Board of Education* and *United States v. Virginia* (*VMI*), the Supreme Court coupled anti-subordination and formal equality in public education equal protection problems.[322] In these cases, the Court sought to advance the interests of disadvantaged groups (blacks and women, respectively) by mandating that they be treated like everyone else in public school admissions.[323] At each of these moments, these two strategies were inextricably linked.[324] This approach demonstrates the best spirit of the Fourteenth Amendment—its dual ideals of providing equal protection to disadvantaged individuals and treating everyone alike are both fulfilled.[325]

Creating true equal educational opportunity for LGBTQ students likewise requires reuniting anti-subordination with formal equality by actively working to eliminate discrimination within integrated schools.[326] Reuniting anti-subordination with formal equality, rather than prioritizing anti-subordination over formal equality, embraces both of equal protection's goals of treating people alike and providing equal protection for disadvantaged individuals.[327] This approach provides a way to meet the immediate needs of LGBTQ students without sacrificing society's ultimate goal—a public school system and society in which no student will be treated differently based on classifications.[328]

Simply requiring inclusion unfortunately does not always solve the equal protection problem.[329] The disparate educational experiences some minority and female students receive today, for example, occur in integrated schools.[330] LGBTQ students have not been systematically excluded from public schools at all; the discrimination they face has occurred in an integrated setting.[331] Yet reuniting these equal protection theories within integrated schools presents the best approach to overcoming the problems facing LGBTQ students today

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[322] *VMI*, 518 U.S. at 533–34; *Brown*, 347 U.S. at 495.

[323] *VMI*, 518 U.S. at 533–34; *Brown*, 347 U.S. at 495.

[324] *See VMI*, 518 U.S. at 533–34; *Brown*, 347 U.S. at 495.

[325] *See VMI*, 518 U.S. at 533–34; *Brown*, 347 U.S. at 495; *see also* U.S. CONST. amend. XIV, § 1.

[326] *See VMI*, 518 U.S. at 533–34; *Brown*, 347 U.S. at 495.

[327] *See VMI*, 518 U.S. at 533–34; *Brown*, 347 U.S. at 495.

[328] *See VMI*, 518 U.S. at 533–34; *Brown*, 347 U.S. at 495.

[329] *See* Nemko, *supra* note 3, at 53–60; Smith, *supra* note 3, at 2041–42.

[330] *See* Nemko, *supra* note 3, at 53–60; Smith, *supra* note 3, at 2041–42.

[331] *See supra* note 130 and accompanying text.

because it takes the needs of LGBTQ students seriously while avoiding the pitfalls of segregation.[332]

Advocates for LGBTQ youth have identified programs that assist LGBTQ students within integrated schools.[333] These programs may include counseling and peer support, increasing age-appropriate information about homosexuality in the curriculum, and providing staff development on LGBTQ issues.[334] An aggressive program within an integrated school has the advantage of educating heterosexual students and educators, as well as providing for the needs of LGBTQ students, increasing the possibility of long-term success in eradicating discrimination, and providing an equal educational opportunity.[335]

Project 10, a comprehensive program that originated in the Los Angeles Unified School District, presents a concrete alternative to the voluntary school segregation approach that HMHS embodies.[336] Project 10 combines education, school safety initiatives, dropout prevention tactics, and student support services to meet the needs of LGBTQ students within integrated public schools.[337] Project 10 takes the problem of providing equal educational opportunity to LGBTQ students seriously, embracing anti-subordination.[338] It also ensures that all students attend school together and learn together in a setting sensitive to LGBTQ issues, embracing formal equality.[339] This unifying approach provides a method for achieving both of equal protection's goals while avoiding segregation's problems.[340] LGBTQ students who faced harassment in the past have found support and success in schools implementing Project 10.[341] Its method has been adapted or considered by other public schools across the country.[342] HMHS, a last

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[332] *See VMI*, 518 U.S. at 533–34; *Brown*, 347 U.S. at 495.

[333] *See, e.g.*, Wendy Schwartz, *Improving the School Experience for Gay, Lesbian and Bisexual Students*, ERIC DIGEST No. 101, Oct. 1994, at 3–4.

[334] *Id.*

[335] *See, e.g.*, *About Project 10*, *at* http://www.project10.org (last visited Sept. 3, 2004) (the website for Project 10, a model for providing LGBTQ students with support in public schools, affirming the inclusive vision of programs in integrated schools in its mission statement).

[336] *See id.*

[337] Rofes, *supra* note 130, at 447–48 (discussing Project 10); *see generally Project 10*, *at* http://www.project10.org (last visited Sept. 3, 2004).

[338] *See* Rofes, *supra* note 130, at 447–48 (describing how Project 10 meets LGBTQ students' needs).

[339] *See id.* at 448 (describing the mainstream context in which Project 10 operates).

[340] *See id.* at 447–48.

[341] *Id.* at 448.

[342] Armstrong, *supra* note 179, at 87; Rofes, *supra* note 130, at 448.

resort for students whose integrated schools have failed them, may not be the last resort after all.[343]

The problem is not HMHS itself, which makes a noble attempt to meet pressing LGBTQ student needs that currently are ignored.[344] The problem is that adopting this approach in a widespread fashion sacrifices long-term equal protection for short-term equal protection.[345] Integrated education without discrimination is certainly more difficult to implement and enforce and will take longer to accomplish.[346] Ultimately the hard work is worth it, however, because students deserve equal protection not only now, but always.[347]

Conclusion

The Harvey Milk High School utilizes anti-subordination without formal equality in the context of voluntary school segregation. This approach sends the negative message that hostility justifies segregation. It also allows discrimination in integrated schools to continue, entrenches classifications, and creates stigma. Although anti-subordination is a powerful theory, it alone is not enough. Anti-subordination must be reunited with formal equality through comprehensive programs in integrated schools. This approach serves both the immediate and future needs of LGBTQ students and does not abandon the possibility that someday these students will not be treated differently at all. In this way, American public schools can provide equal protection for at-risk students in the best spirit of the Fourteenth Amendment.

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[343] *See* Rofes, *supra* note 130, at 447–50 (presenting information on both Project 10 and the original HMHS program).

[344] *See* Ford, *supra* note 89, at 1326.

[345] *See Cooper*, 358 U.S. at 16.

[346] Ford, *supra* note 89, at 1326, 1328.

[347] *See VMI*, 518 U.S. at 533–34; *Cooper*, 358 U.S. at 16; *Brown*, 347 U.S. at 495.